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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 817

EXPORT LIQUOR SALES, INC.
Petitioner,

vs.

AMMEX WAREHOUSE COMPANY, INC.

and

DETROIT & CANADA TUNNEL CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Detroit & Canada Tunnel Corporation, one of the Respondents herein, prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied, for the reasons set forth herein.

OPINIONS AND ORDERS BELOW

Respondent agrees that the orders and the opinion referred to in the petition are material and revelant, but states that the opinion of the United States District Court for the Eastern District of Michigan, Southern Division, per Fred W. Kaess, District Judge, is also material and relevant, and such opinion is reprinted in the Appendix to this brief. (1b)*

QUESTIONS PRESENTED

Respondent Detroit & Canada Tunnel Corporation believes that the following restatement of the Questions Presented will present a clearer and more concise picture of the real issues before this Court:

1. Did the District Court properly deny Petitioner's petition for a preliminary injunction restraining Respondent Detroit & Canada Tunnel Corporation from proceeding with its state court action?
2. Were the actions of respondents in entering into the agreement under which the Tunnel Corporation granted Annex the exclusive right to deliver export liquor on the Tunnel Corporation's property and the alleged refusal of the Tunnel Corporation to permit petitioner to come onto the Tunnel Corporation's property for the purpose of delivering export liquor to the public a violation of Section 1 or Section 2 of the Sherman Act?

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*References: Figures followed by the letter a, all in parentheses, refer to the page number of the appendix to the petition for certiorari. Figures followed by the letter b, all in parentheses, refer to the page number of the appendix to this brief.

STATUTES INVOLVED

15 U.S.C. §§1, 2.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case not only contains much that is argumentative but it includes as statements of fact matters that are not supported by the record, fails to contain "All that is material to the consideration of the questions presented" as required by Section 1(e) or Rule 40, and omits "appropriate references to the appendix" "accompanied by the appropriate page number" as required by section 1(e) of Rule 40 and Section 2 of Rule 40. This disregard of the Rules makes unduly burdensome the task of respondents in "correcting any inaccuracy or ominions in the statement" as provided for in Section 3 of Rule 40.

At the end of the paragraph which commences on page 4 and continues on page 5 of the Petition is the statement that the complaint charges respondents with conspiring "to eliminate all competition in the duty-free liquor export business, not only at the Tunnel * * * but also in the various other ports in the State of Michigan and throughout the rest of the country." There is no such allegation in the complaint (9a-16a) or elsewhere in the record and if there were it would be patently untrue because the Tunnel Corporation has no interest in any other "port" in the country or in any export liquor business at such port. The same thing is true of the paragraph that starts on the bottom of page 7 and continues on page 8.

In the last complete paragraph on page 7 of the petition reference is made to "another lucrative arrangement with

Chrysler Corporation." Again there is nothing in the record to support this statement but even if there were it would not be of importance because any arrangements made with Chrysler Corporation as a shipper to facilitate shipments of its products to Canada would have no bearing on petitioner's right to use the Tunnel Company's property as a public market place for its products.

In the first complete paragraph on page 7 of the Petition is the statement that the Tunnel Corporation commenced a trespass action in a state court of Michigan and obtained a temporary restraining order against petitioner's "trespassing" in connection with its liquor business; that the restraining order was dissolved by the District Court in this case but was later reinstated when the case was dismissed. There is no elaboration of these statements elsewhere in the Petition and Petitioner's appendix contains nothing with respect thereto except the order of the District Court denying petitioner's petition for preliminary injunction and rescinding its order "dissolving" the state court order (1a-2a) and the Opinion of the Court of Appeals (5a-7a). The complaint in this cause made no mention of the state court action (9a-16a). To supply these deficiencies we incorporate in the appendix to this brief the following, all of which were included in the joint appendix filed with the Court of Appeals:

Docket Entries in the District Court (6b).

Petitioner's Petition for Order to Show Cause and Temporary Restraining Order, filed simultaneously with the filing of the Complaint in this cause (7b).

Order to Show Cause and Temporary Restraining Order entered in the District Court in this cause which among other things "dissolved" the temporary restraining order entered in the State Court (10b).

The Complaint filed in the State Court action and the supporting affidavits annexed thereto (12b).

The Order to Show Cause and Temporary restraining Order entered in the State Court which restrained petitioner from trespassing on the Tunnel Corporation property, from interfering with the collection of tolls at the Tunnel, and from causing congestion and traffic hazards on the Tunnel property (21b).

It may be argued that since the complaint in this cause made no mention of the state court litigation these documents may not be considered in passing on the order dismissing the complaint. However a sworn petition filed by a plaintiff simultaneously with and to implement an unsworn complaint should certainly be treated as a part of the complaint for the purpose of testing its sufficiency and since the Petition for Temporary Restraining Order filed in this cause purported to recite the contents of the complaint filed and temporary restraining order issued in the state court those documents themselves may be presented and control as to their contents. *Mengel Company v. Nashville Paper Products, et al.*, 221 F. 2d 644 (6th Cir. 1955). Be that as it may, these documents can certainly be considered in passing on the District Court's order denying petitioner's petition for preliminary injunction.

In early October, 1953, Petitioner began operations at the Detroit & Canada Tunnel, said operations being aimed at soliciting and selling "in-bond" liquor (and other merchandise not here material) to travelers going to Canada. Such liquor, if exported by the purchaser, is duty and tax free. In order to meet United States Customs regulations, Petitioner must have one of its employees carry the liquor from its store at the foot of Brush Street to the Tunnel entrance, have the purchase checked by a Cus-

toms Officer, and then delivered to the purchaser waiting in his car. (13b) This maneuvering has caused extreme congestion and confusion at the Tunnel entrance, and has created an extremely dangerous and hazardous problem. Cars were cutting from one lane to another, Petitioner's employees were slipping between traffic, toll collections were interfered with and delayed as liquor was delivered as toll was being collected, and bus and truck traffic was interrupted as purchasers' cars traveled in front of buses or over the truck scales. (13b-14b, 17b, 20b) As Petitioner's business is heaviest when Tunnel traffic is heaviest, problems were compounded. (17b)

Respondent Tunnel instituted an action in the Wayne County Circuit Court for trespass against Petitioner (12b), and obtained a restraining order against Petitioner from carrying on its business in a manner involving trespass on Tunnel property (21b), or in a manner designed to cause confusion, congestion or hazardous traffic conditions. Respondent Tunnel owns or leases the entire entrance to the Tunnel, including the entire right of way of Woodbridge Street east to Mariner's Church, which is located on the northwest corner of the intersection of Woodbridge and Randolph Streets (12b).

Petitioner then filed suit in the United States District Court for the Eastern District of Michigan, Southern Division, alleging violation of the anti-trust laws (9a) and obtained a restraining order from Judge Fred W. Kness "dissolving" the state court injunction and restraining Respondent from proceeding in the state court action (7b). An order to show cause why a preliminary injunction, similar to the restraining order, should not issue was set for October 18, 1968 and adjourned to October 25, 1968. Briefs were filed with the District Court, and oral arguments were heard on the adjourned date. Judge

Kaess denied Petitioner's Motion for Preliminary Injunction, dissolved the Temporary Restraining Order and rescinded his previous order "dissolving" the State Court Restraining Order. Judge Kaess also dismissed the action for failure to state a cause of action. From these actions Petitioner appealed to the Court of Appeals for the Sixth Circuit which affirmed the action of the District Court (5a).

REASONS FOR DENYING THE WRIT

Petitioner's reasons for granting the writ are somewhat obscure. It does not assert any of the traditional reasons listed in Rule 19. Specifically, it does not contend that the decisions of the Court of Appeals in this case is in conflict with the decision of any other Court of Appeals or with any prior decision of this Court. While the petitioner implies that the case involves matters that have not been decided by this Court it does not specifically so state, and if it did, it would not be correct.

An export liquor store on the Tunnel Corporation property is a service provided by the Tunnel Corporation to its customers. Basically, the question involved in this case is whether the Tunnel Corporation has the right to determine who shall be permitted to come on to its property for the purpose of furnishing this service to the Tunnel Corporation's customers. This, of course, involves the making of a good many business decisions which it is the right of the Tunnel Corporation itself to make. The fact that the Tunnel Corporation derives a profit from the operation of the liquor store as a result of the percentage lease does not bring the case within the purview of the Sherman Act.

Petitioner does not wish to come on plaintiff's property for the purpose of availing itself of the Tunnel Corporation's facilities for the purpose for which they are made available to the public. It wishes to come on plaintiff's property for the purpose of carrying on on that property a competing service to that being offered by the person selected by the owner of that property. He is complaining because of the Tunnel Corporation's refusal to permit him to do so. This is his real and only complaint and this Court should not become confused by petitioner's clothing his argument in the habiliments of a claim for denial of access to the services of customs. Basically, the only reason asserted by petitioner for granting the writ is that the decisions of the two courts below were wrong. That is not usually considered as a sufficient reason for the intervention of this Court and furthermore the assertion of error is without merit. This is not a new question, never before decided by this Court. As the Court of Appeals stated, the question is governed by *Donovan v. Pennsylvania Co.*, 199 U.S. 279 (1905), which case, as stated in the appellate opinion, "enjoys continued vitality." *Donovan v. Pennsylvania Company* was a suit growing out of the operation of the Union Station in Chicago. Pennsylvania Company managed and operated the station which was used as a terminal for its own trains and also as a terminal for the trains of a number of other railroads. In its complaint, plaintiff set forth its efforts for many years to protect incoming and outgoing passengers from extortion and annoyances practiced by railroad hackmen, expressmen, and hotel runners, congregating in its station and noisily soliciting the patronage of passengers, as a result of which it had been compelled in 1894 to enter into an arrangement or contract with one Eighme for the purpose of furnishing carriage and cab service to passengers arriv-

ing at the station, for which the railroad gave Eighme a small piece of ground to use for a carriage stand and Eighme agreed to provide adequate and satisfactory cab service and to charge only rates fixed by a Chicago ordinance. Eighme had been allowed to place an agent in the station to notify passengers that cabs and carriages were available. In 1902 the agreement with Eighme was terminated and a similar arrangement was made with Parmelee, who carried on the business in the same manner (199 U.S. 282-283). Plaintiff's bill alleged that the defendants, who were hack drivers, had conspired to injure its business, alleging that they gathered in numbers of from eight to twenty men at a time in front of the station and entered the station by twos and threes without plaintiff's consent and against its objections and in loud and boisterous voices and manner solicited passengers and baggage for their vehicles, that in so doing they harassed and annoyed passengers and in general made themselves objectionable to the plaintiff and to its passengers and disrupted plaintiff's orderly conduct of its business in the station. (199 U.S. 283-284). Plaintiff was granted a preliminary injunction which, as modified by the Circuit Court of Appeals, restrained defendants and their confederates from entering the station to solicit the business of passenger for cabs, carriages and hotels and from congregating on the sidewalks in front of the station so as to interfere with the ingress and egress of passengers and employees, and defendants appealed. Defendants raised precisely the same questions that petitioner has raised in this case. They challenged the right of plaintiff to grant to Parmelee the exclusive right to solicit business in plaintiff's station, asserting that as a railroad it had a legal obligation to refrain from discrimination and that the railroad's contract with Parmelee created an unlawful monopoly, and

that plaintiff had no right to exclude defendants from the station for the purpose of soliciting business while permitting Parmelee to do so. In its opinion approving the action of the Circuit Court of Appeals, this Court said:

> "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, *having no business with it*, may make profit to themselves. *Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.*" (199 U.S. 293-294)
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> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee

Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses —certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord to this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling. The defendants did not have or profess to have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the State, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee Company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, *that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor*

> *does it involve an improper use by the railroad company of its property.* That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, *and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company by such use of its property also derived pecuniary profit for itself, that was a matter of no concern to the defendants and gave them no ground of complaint.* (Italics supplied) (199 U.S. 296-297)

The only difference between the Donovan case and the case at bar is that the Donovan case involved the right of a group of hack drivers to enter the plaintiff's station for the purpose of soliciting business while this case involves the right of petitioner to come on the Tunnel Corporation's property for the purpose of selling or delivering its products to the public. While the Donovan case was decided in 1905 it "enjoys continued vitality" as expressed by the Court of Appeals in this case (7a) and is a clear expression by this Court of the right even of a public utility to control the use of its own property. Petitioner has not cited a single case which would lend any support to its contention. *Hostetter v. Idlewild Bon Vogage Liquor Corp.*, 377 U.S. 324 (1964), and *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), cited by Petitioner, are not apposite. The former case dealt exclusively with the extent of permissible state regulation of in-bond liquor operations. That problem is not before us, as the State of Michigan has never attempted to control Petitioner's operations in any way. The latter case deals with a conspiracy between two or more taxicab companies in connection with obtaining an exclusive license with a railroad depot. The District Court complaint of Petitioner does not state facts but conclusions of

law. Nowhere in the complaint does Petitioner allege an agreement or conspiracy between Respondent Ammex Warehouse Company, Inc., and any other in-bond liquor dealer in connection with any negotiation for lease of space at the Tunnel. The complaint specifically states that Petitioner does not even know the date of the Ammex-Tunnel lease (paragraph 6); no allegation of illegal actions between Ammex and its competitors in connection with obtaining that lease is claimed. The *Yellow Cab Co.* case specifically states that exclusive contracts between private companies and public utilities are permissible, citing *Donovan* (332 U.S. at 229).

The real goal of Petitioner is a private storage and/or delivery point on Tunnel property. While it is not shown by the record, and can be considered only in connection with the court's denial of the preliminary injunction, continuously for the past year, and today, Petitioner is operating at the Tunnel, and has access to Customs Inspection, though restricted from coming onto Tunnel property. The Customs officer now performing inspections for Petitioner, and whose salary is paid by Petitioner, is actually stationed on Respondent Tunnel's own property, as Respondent Tunnel has assumed that the state trespass injunction cannot run to a United States Customs officer. If the Tunnel should be required to permit a number of vendors, taxi-cab companies, hawkers, or other businessmen to set up shop on the private property of the Tunnel, (and such property is "private" with respect to those of the general public who come there for purposes other than transportation, *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 294 (1905)), then there would be no room for the general public who come to use the Tunnel for its public purpose, in this case transportation to Canada. The primary function of Respondent Tunnel is transportation to Can-

ada, and it has an obligation to restrict incidental activities, permitting only those which do not hamper the primary function of the utility.

Export Liquor Sales, Inc. is not using and does not wish to use Tunnel property for transportation and does not need to have a delivery point on Tunnel property in order to conduct its business, as it has demonstrated by remaining in business after it was forbidden to come onto Tunnel property. Petitioner seeks to trespass on Tunnel property for purposes of economic gain to itself. The Tunnel is not discriminating in any manner against those members of the public who are using the Tunnel for transportation purposes. No commuter or other Tunnel user is complaining of any discrimination. In fact, allowing Petitioner here to move its operation onto Tunnel property will result in a decrease in efficient service to the general public.

Respondent asks this Court to consider not only the operations of Petitioner, but also those of the third and fourth export liquor sellers, who are waiting to institute similar operations. How will the Tunnel be able to provide proper service to its passengers, as it is required to do by law, if it must contend with several liquor sellers and the confusion, congestion, and traffic hazards they maintain?

The situation is somewhat analogous to a restaurant or other concession at Washington National Airport. If any number of concessions were permitted at the airport, without limit, this would hamper the efficient servicing and subject the airport to justifiable criticism. If two, or three, or even more liquor sellers were permitted to carry on their trade on Tunnel property, which is crowded already, there would be a constant interference with fare-paying Tunnel passengers.

Of prime importance is the tremendous safety problem created by Petitioner's operations. That problem was the principal basis for Respondent's action in the Michigan State Court. The Tunnel has an obligation to prevent congestion and traffic hazards at the Tunnel entrance, and is attempting to fulfill that duty.

The law in Michigan follows the same philosophy as the Federal law. The modern public utility is commonly understood as undertaking to render its particular service within a defined area or territory. Upon like reasoning, service is not required in areas beyond the limits to which the general proffer extends, even though for other purposes a line has been extended into such territory. In *Huron Portland Cement Company v. Public Service Commission*, 351 Mich. 255, 88 N.W. 2d 492 (1958), Consumers Power Company was not required to furnish electrical service to Plaintiff cement company because the power company never proffered to serve that area. Respondent Tunnel has never proffered to render general service to export liquor dealers, and such dealers are not part of the general public to which the Tunnel undertakes to provide service. Another Michigan case on point is *Nelson v. County of Wayne*, 289 Mich. 284, 286 N.W. 617 (1939). In the *Nelson* case, a municipally owned water system extended a line beyond city limits for the purpose of supplying water to a county institution. A general service to the public was not proffered, nor did the line have adequate capacity to supply the area. A few private residents were permitted to tap, however. Under these circumstances the Michigan Supreme Court held that the water company could not be required to permit other private citizens the opportunity to tap. Here the Tunnel was created to provide international transportation to auto and bus passengers. It did permit one private company to lease space for the purpose of carrying on an export

liquor business. Its facilities are not large enough nor extensive enough to permit more than one such company to engage in this business. The facts are identical to the facts in the *Nelson* case, and the law of that case should be applied. The Tunnel cannot be required to extend its facilities and services to other commercial companies, especially when the furnishing of such services is not the primary aim of the Tunnel. Reiterating what was said above, as between the Tunnel and companies which do not use the Tunnel's transportation services, the Tunnel's property is like private property and should be dealt with as such.

Another Michigan case on point is *Dingman v. Duluth, South Shore & Atlantic Railway Company*, 164 Mich. 328, 130 N.W. 24 (1911). Plaintiff in this suit alleged that Defendant railroad had a duty to afford equal facilities to all persons operating bus and baggage wagons, soliciting passengers on its trains and at its depots, and that Defendant favored one such bus company and discriminated against all the rest. The Michigan Supreme Court said that the railroad has not only the power, but the obligation, to discriminate, if such discrimination is for the purpose of promotion of passenger convenience. See also *Napman v. People*, 19 Mich. 352 (1869), to the same effect.

Petitioner argues that it has a right to export and that it is prevented from reaching United States Customs. First, Petitioner has not been denied any right, if there be one, to export; it is and has been selling and delivering alcoholic liquors to travelers; it is attempting to carry on a commercial operation on Respondent's property. Second, neither Petitioner nor any other traveler has a right to Customs inspection when leaving the country. Customs inspection is required upon re-entry, but there are no facilities for Customs inspection upon leaving the country. Because Petitioner has chosen to enter a business which re-

quires a Customs officer's supervision (in order to avoid taxes and duties) and which business requires Petitioner to provide and pay the salary of a Customs officer to carry out this supervision, it does not follow that Petitioner has a right to carry on its business on Tunnel property. Petitioner wants to furnish a Customs officer itself at a place where there is normally no Customs inspection, and then argue that it is denied access to this same man, whose salary it pays. This argument is made by Petitioner despite the fact that Petitioner is now and has for some time been conducting its business on public property, without hindrance, and with Customs inspection by a Customs officer based on Tunnel property.

CONCLUSION

The Tunnel Corporation respectfully asserts that the District Court was correct in denying the petition for a preliminary injunction and in dismissing the complaint; that the Court of Appeals was correct in affirming those orders; that no adequate reason has been shown for seeking the intervention of this Court, and that the petition for the writ of certiorari should be denied.

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APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

(47) The Court: Plaintiff, Export Liquor Sales, commenced this action against Ammex Warehouse and the Detroit & Canada Tunnel Corporation, alleging violation of the Anti-trust laws with particular reference to the Sections as set forth in the Complaint.

It is alleged that the Defendant Tunnel is a public utility and that it has exclusive control of the area involving the area where Ammex is located; that the Tunnel has leased that portion of the property to the Defendant Ammex so that they may carry on a retail store for the sale of liquor and other items. In any event, that as a result of the agreement between the Tunnel and Ammex, together with the actions of each, all competition between any other competitor for the sales of whiskey or liquors and the Defendants would be destroyed. The Plaintiff therefore prays that the Defendants be enjoined from continuing to exclude them from the area and that they be allowed space comparable whereby they may operate a retail store and compete with Ammex.

I suppose one might say parenthetically that, in effect, the Plaintiff wants this Court to make a contract or a lease between the Tunnel and Export, the Plaintiff here, and provide space to conduct a retail establishment or retail distributorship.

(48) This case had its origin in a suit that the Tunnel Company commenced as a trespass suit against Export,

the Plaintiff here, in Wayne Circuit Court, alleging that Export was interfering with the flow of traffic and caused danger to persons and, in effect, interfered with interstate commerce or the orderly flow of traffic through the tunnel. A temporary restraining order was issued by the Circuit Court, restraining Export from trespassing on Tunnel property. This suit was then begun and the temporary restraining order was issued, enjoining the enforcement of the State Court order pending hearing in this Court.

As I see it, the issue before this Court is, as I have indicated, whether or not the Tunnel Company has the right, bearing in mind the Sherman and Clayton Acts, to grant an exclusive, call it franchise, to operate its liquor sales business on the premises, as we understand them to be.

In a matter such as this, I think I must assume the facts as alleged in the Complaint to be true and therefore, and I think it has been agreed that the tunnel is in the nature of a public utility and, as such, it may not discriminate against those who use the tunnel for the purpose designed or designated, and that is as a means of travel from the United States to Canada (49) by automobile, truck and other vehicular travel. Thus, that portion of the tunnel's property designed for public use must be used in such a manner as not to discriminate. In other words, by comparison, it must not be discriminating as to race, as to trucks, buses, automobiles, passengers, whatnot, those activities being engaged in travel through the tunnel. However, this situation is similar to that of railroad stations. It is private property even to the public and all else, but an interest in the benefit of its uses. Those portions of the Tunnel property used for travel are for public use and should be devoted for public use without discrimination. The remaining area owned by the Tunnel and leased to Ammex is not for public use, but is considered private

property and the Court does adopt the language of Donovan versus Pennsylvania, 199 U.S. 279, where it says:

> "It is not bound to so use its property that others, having no business with it, may make profit to themselves. The property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of *transportation.*"

This similarity is likened to the situation involving concessions at Tiger Stadium, the beer and the hot dogs and so on, the City-County Building (50) with its food concessions, railroad stations with their magazine stands, restaurants and so on, and airports where they also have certain concessions. Even to the extent of private airports where they might be giving flying instructions or given an area for flying instructions and so on. I suppose there are many other examples.

There has been no real showing, nor is it alleged that Export, Plaintiff, has been discriminated against in using the tunnel for transportation or that special rates or price fixing existed between the tunnel and the users of the tunnel for transportation, and that is trucking companies, buses and so on.

The Complaint alleges, in substance, that there is a refusal to lease property to Plaintiff, not to deny him use of the tunnel for transportation. Although the tunnel is privately owned, the facilities primarily are designed to benefit the public in providing transportation to and from Canada. To that extent, the property owned by the Tunnel is a benefit to the public and must so operate itself.

Beyond that, it is the ruling of the Court the Tunnel has no duty to either lease property, allow concession stands

to be set up, open a retail store, or to provide any other facility. It is merely to provide means upon which transportation may occur. If the (51) Tunnel desires, it can deny sales outlets to all parties and set up its own retail store, I would suppose. The relief sought has no relation to the purpose for which the tunnel is a public utility and any reference thereto is immaterial or irrelevant.

Going to and from Canada, supplying transportation to that area, is a far cry from selling whiskey. Therefore, the Court holds that the property in question is private property and as such reasonable restrictions may be placed by the Tunnel so that its primary function to the public may be realized. The Tunnel has no duty to lease that or other property to one so that they may derive a benefit unrelated to the purpose of the tunnel.

The purpose of the tunnel is to provide a means of transportation. The purpose of Export, the Plaintiff here, is to set up a retail store. Running a store is as unrelated to driving through a tunnel as this Court can realize. That which makes the tunnel a public utility is that it provides a way of transportation and not because of Ammex. Take away the tunnel and you no longer have a public utility.

The Court bases it opinion on Donovan and Dingman versus Duluth, South Shore & Atlantic Railway Company, 164 Mich. 328, Volume 276 of the United States (52) Reports in the October Term of 1927 of the Supreme Court, where the Court has said:

> "As against those not using it for purposes of transportation"—this was a railroad case—"the railroad is private property in every legal sense, and if any part of its land is capable of use that does not interfere with the discharge of its obligations as a carrier, the railroad has the right to use or permit others so to use it for any lawful purpose."

I am quoting now from the syllabus:

> "A railroad is not bound to permit persons having no business with it to enter its trains, station or grounds to solicit trade or patronage for themselves, and the grant of such privilege to one does not give rise to any duty to others."

I am also referring to A.L.R. 1st 356, where there is comment about the, as I recall, Kalamazoo Hack Company case as not being in line with the majority thinking.

Therefore, the restraining order is and hereby is dissolved, but the case is not dismissed unless I have further motion.

That is it, gentlemen.

• • • • •

(54) Mr. Wittlinger: If it please the Court, at this time, based on your Honor's opinion, we would move to have the Complaint dismissed for failure to show a cause (55) of action. In support of our motion, I would state that if the issue is going to be appealed, the Court of Appeals might be able to best handle both issues at once.

The Court: I will grant that so the issue is right up in there.

Mr. Wittlinger: Thank you, your Honor.

DOCKET ENTRIES IN DISTRICT COURT

1968

Oct. 15. Complaint, filed—summons issued.

Oct. 15. Petition for order to show cause and temporary restraining order, filed.

Oct. 15. Order to show cause and temporary restraining order, returnable Oct. 19/68, filed and entered.

Oct. 25. Hearing had on order to show cause; Pltf's motion for continuance of restraining order denied. Complaint dismissed.

Oct. 30. Order denying pltf's petition for preliminary injunction and dissolving temporary restraining order, filed and entered.

Oct. 30. Order dismissing action without costs, filed and entered.

Oct. 30. Order denying stay of proceedings pending appeal, filed and entered.

Nov. 6. Pltf's notice of appeal, filed.

Nov. 7. Appeal bond in $250.00, filed. Travelers Indemnity Co., surety.

1969

Jan. 7. Transcript of Oct. 25/68, filed.

PETITION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

(Filed October 15, 1968)

Your petitioner, Export Liquor Sales, Inc., a Michigan corporation, respectfully shows unto this Honorable Court as follows:

1. That your petitioner has filed a civil action in the above-entitled cause in this Court under the provisions of Section 15 and 26 of Title 15, United States Code, being part of the Act of Congress of the United States of America dated July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," as amended, commonly known as the Sherman and Clayton Acts.

2. That the purpose of this action is to recover damages and to prevent the Defendants from injuring the Plaintiff in its business of the retail sale of liquor for export which results from the violations of the anti-trust laws of the United States and to restrain and enjoin the Defendants from continuing a monopoly and a combination of conspiracies and contracts in restraint of trade and interstate commerce.

3. That negotiations were held between the Plaintiff and the Defendants, who have refused to permit Plaintiff access to the facilities of the Detroit-Windsor Tunnel at the time that they permit access to Plaintiff's competitor, Defendant Ammex Warehouse Company, Inc.

4. That upon Plaintiff's threatening to bring a civil action in the United States Courts, the Defendant, Detroit & Canada Tunnel Corporation, turned around and brought

an action in the Circuit Court for the County of Wayne against the Plaintiff herein, being Civil Action No. 119900, to enjoin the Plaintiff from using the facilities of the Detroit-Windsor Tunnel, in violation of the rights to free travel in interstate commerce and to permit the free access of the Plaintiff to customs inspection, on the alleged theory that plaintiff was trespassing.

5. That the Detroit & Canada Tunnel Corporation has stated their Complaint in the Wayne County Circuit Court in such a manner as to make it non-removable to the Federal Courts, under the provisions of Title 28, Section 1441 of the United States Code.

6. That in addition, the Defendant, Detroit & Canada Tunnel Corporation, obtained from the Honorable Joseph G. Rashid a temporary injunction restraining the Plaintiff herein from engaging in its business and restraining it from using the inter-state commerce facilities of the Detroit-Windsor Tunnel and, further, restraining it from access to the United States Customs Officers, which, in effect, has put Plaintiff out of business. At the same time, however, the Detroit & Canada Tunnel Corporation has permitted the Defendant, Ammex Warehouse Company, Inc., the use of the facilities and customs officers.

7. That unless an Order to Show Cause issue out of this Court as to why the proceedings in the Wayne County Circuit Court shall not be permanently enjoined; and unless, pending the hearing on said Order to Show Cause, the Detroit & Canada Tunnel Corporation is restrained and enjoined from proceeding in the Wayne County Circuit Court and the temporary injunction issued by the Wayne County Circuit Court is not dissolved insofar as it interfers with the Plaintiff conducting its business in interstate commerce and permitting free access to United States Cus-

toms Officers, your Plaintiff will be irreparably injured, will have to close down his business operations and will be permitting the Defendant, Ammex Warehouse Company, Inc., to enjoy a monopolistic position.

Wherefore, Plaintiff prays:

A. That an Order to Show Cause be issued to the Defendant, Detroit & Canada Tunnel Corporation, as to why it should not be permanently enjoined from proceeding in the Wayne County Circuit Court action following a hearing on said Order to Show Cause.

B. That the Court temporarily enjoin the Detroit & Canada Tunnel Corporation from proceeding in the Wayne County Circuit Court pending the hearing of the Order to Show Cause issued by this Court.

C. Temporarily dissolving the injunction and restraining order issued by the Wayne County Circuit Court pending the hearing on the Order to Show Cause issued by this Court insofar as it interferes with the Plaintiff's right to conduct its business in interstate commerce and to use the Detroit-Widsor Tunnel facilities to a point where it can have access to United States Customs inspections.

D. Such other and further relief as the Plaintiff may be justly entitled.

/s/ James P. Fox

Lebenbom, Handler, Brody &
Morganroth

By Fred Morganroth
Attorneys for Plaintiff
2118 Guardian Building
Detroit, Michigan 48226

State of Michigan,
County of Wayne—ss.

On this 15th day of October, 1968, before me personally appeared the above-named James P. Fox, who, being first duly sworn, deposes and says that he is the President of the Plaintiff, Export Liquor Sales, Inc., and that he has read the foregoing Petition by him subscribed and that the same is true of his own knowledge, except those matters stated therein to be upon information and belief, and as to those matters, he believes them to be true.

Lueva Dixon
Notary Public, Wayne County, Michigan.
My commission expires October 31, 1971.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

At a session of said Court held at the Feder Building, Detroit, Michigan, this 15th day of October, 196[illegible].

Present: Honorable Fred W. Kaess, District Judge.

Upon reading and filing the annexed verified petition of the Plaintiff herein, and upon exhibiting the Civil Complaint filed in this cause, and it further appearing that the Defendant herein, Detroit & Canada Tunnel Corporation, has commenced an action against the Plaintiff in the Circuit Court for the County of Wayne, being case number 119900 and having obtained an injunction and restraining order therein, and it further appearing to the Court that this Court has superior jurisdiction over the matters charged in the Civil Complaint, and that the injunction issued out of the Wayne County Circuit Court is prohibiting the Plaintiff from engaging in interstate commerce

and permitting him access to the offices of the United States Customs Department, and the Court being otherwise fully advised in the premises.

Now, therefore, upon motion of Lebenbom, Handler, Brody & Morganroth, attorneys for the Plaintiff.

It is hereby ordered that Detroit & Canada Tunnel Corporation, a Michigan corporation, be and hereby is ordered to show cause before this Court on the 18th day of October, 1968. at 9:30 o'clock in the forenoon, as to why it should not be permanently enjoined from proceeding with its action number 119900 pending in the Wayne County Circuit Court, and

It is Further Ordered that, pending the hearing on this Order to Show Cause, the Detroit & Canada Tunnel Corporation be and hereby is enjoined and restrained from proceeding in any manner whatsoever with its cause of action in the Wayne County Circuit Court, being number 119900, and

It is Further Ordered that the temporary restraining order issued by the Honorable Joseph G. Rashid, judge of the Wayne County Circuit Court, in Civil Action No. 119900 be and hereby is dissolved, pending the hearing on this Order to Show Cause insofar as it prohibits the Plaintiff, Export Liquor Sales, Inc., from the free access to the United States Customs Officers located at the Detroit-Windsor Tunnel and from the delivery of its merchandise in interstate commerce across said facility to a point sufficient to permit customs inspection, and

It is Further Ordered that since there is an unlikelihood of harm, pending the hearing on this Order to Show Cause, that no bond is required.

s/ Fred W. Kaess
District Judge

This order issued
October 15, 1968, at 1:00 o'clock, P.M.

COMPLAINT

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

Detroit & Canada Tunnel Corporation, a Michigan corporation, Plaintiff, vs. Export Liquor Sales, Inc., a Michigan corporation, Defendant.	No. 119900

Comes Now Detroit & Canada Tunnel Corporation, Plaintiff herein, and for its complaint against defendant says as follows:

1. Plaintiff is a Michigan corporation, with a principal office at 151 Atwater Street, Detroit, Michigan.

2. Defendant is a Michigan corporation with an office at 1414 21st Street, Detroit, Michigan.

3. Plaintiff is the owner of the following premises located in the City of Detroit, to wit:

> That property bounded on the North by the South line of Woodbridge Street, on the East by the West line of Randolph Street, on the South by the North line of Atwater Street, and on the West by the East line of vacated Bates Street.

4. Plaintiff is the lessee and entitled to the full use, occupation and possession of the following premises located in the City of Detroit, to wit:

That portion of Woodbridge Street bounded on the North by the South line of the Easterly extension of the Ford Auditorium Plaza, on the East by the Westerly line of Mariners Church extended Southerly, on the South by the North line of Detroit & Canada Tunnel Corporation properties, and on the West by the main East wall of the Ford Auditorium Garage.

5. On Friday, October 11, 1968, Defendant commenced an operation of selling liquor to individuals for export from the United States, said export being by means of Plaintiff's tunnel.

6. Because of United States Customs regulations, it becomes necessary for Defendant to engage in the following operations each time a sale is made:

a) Drive onto Plaintiff's property with oncoming tunnel traffic.

b) Pull to side of road, making U-turn, and park on Plaintiff's property.

c) Leave car, carry liquor to car of purchaser while purchaser's car is waiting to pay toll.

d) Return to car, and drive out of tunnel entrance against oncoming traffic.

7. Said operations constitute a trespass on the property of plaintiff, and defendant's operations threaten a continuing trespass within the meaning of M.S.A. §27A.-2919.

8. Said operations disrupt Plaintiff's operations in the following respects:

a) Delay of tunnel traffic while liquor is handed to purchaser at toll booth.

b) Traffic congestion as defendant's car parks in area reserved for heavy truck traffic and Tunnel Bus operations.

c) Traffic congestion as defendant's car navigates against oncoming traffic as it leaves tunnel area to return to defendant's place of business.

d) Interference with collection of toll at toll booth.

e) Interference with weighing trucks on plaintiff's scale.

f) Causing dangerous traffic hazards in the entrance-way to plaintiff's tunnel.

9. Immediate and irreparable harm will be suffered by plaintiff if defendant's present operations are not enjoined, for the reason that the continuing trespass of defendant causes a situation dangerous to life and property, hampers the efficient operation of the Tunnel, causing delay and backlog of tunnel traffic especially during periods of heavy traffic, and further causing extreme congestion at the Tunnel entrance and a dangerous situation as defendant's employees run across lanes of traffic entering the tunnel, and subjects the Tunnel to liability for any accidents occurring on its poperty as a result of plaintiff's operations.

10. Plaintiff's damages cannot be compensated by a money judgment.

11. Plaintiff has no objection to defendant's operations, if same can be conducted without constituting a continuing trespass on Plaintiff's property or constituting a hindrance to Plaintiff's operations or a situation dangerous to life and property.

12. Plaintiff has requested defendant to cease its trespass on Plaintiff's property, but defendant has refused to comply with this request.

Wherefore, plaintiff requests the following relief:

a) Defendant be required to answer this complaint.

b) Defendant be enjoined from trespassing for commercial purposes on plaintiff's property or property leased to plaintiff; from interfering with the collection of tolls at Plaintiff's tunnel and from causing congestion, traffic hazards, and dangerous traffic conditions on Plaintiff's property or property leased to Plaintiff.

c) Defendant be ordered to show cause why a preliminary injunction should not issue during the pendency of this action enjoining defendant as prayed for in paragraph (b) above.

d) Defendant be temporarily restrained, as prayed for in paragraph (b) above, in the interim pending the hearing on the Order to Show Cause.

e) Plaintiff be awarded costs and reasonable attorney fees.

Detroit & Canada Tunnel Corporation
By /s/ Elliott H. Phillips
Its Secretary and General Counsel

Hill, Lewis, Adams & Goodrich
By /s/ Timothy D. Wittlinger
Attorneys for Plaintiff
3250 Penobscot Building
Detroit, Michigan 48226
962-64855

Dated: October 14, 1968.

State of Michigan,
County of Wayne—ss.

On this 14th day of October, 1968, before me a notary public in and for the county and state aforesaid, personally appeared Elliott H. Phillips, who being by me duly sworn did depose that he is the Secretary and General Counsel of Detroit & Canada Tunnel Corporation. Plaintiff named in the foregoing Complaint, that he signed said Complaint as such, that he has read said Complaint by him subscribed and that the same is true of his own knowledge except as to matters therein stated to be on information or belief and as to those matters he believes the same to be true.

/s/ Margaret George
Notary Public, Wayne County, Michigan.
My Commission expires Nov. 29, 1970.

AFFIDAVIT OF ARTHUR WALCZAK

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

State of Michigan,
County of Wayne—ss.

Arthur Walczak, being duly sworn, deposes and says:

1. That he is the Traffic Captain of the Detroit & Canada Tunnel Corporation.

2. That he has observed the operation of Defendant's liquor sales.

3. That said operations consist of the following:

a. Defendant's vehicle drives into the area near the toll booths, which area is reserved for heavy truck traffic and Tunnel Buses.

b. Defendant's employee parks in this area, gets out of his vehicle, and runs to the auto carrying the purchaser, and hands the liquor to him, while the purchaser is waiting to pay his toll.

c. Defendant's employee returns to his vehicle and drives out of the entrance plaza, against oncoming traffic.

4. That said operation causes congestion and confusion at the tunnel entrance, in that, among other things, it:

a. Hampers the movement of the heavy truck traffic and tunnel bus traffic to and through the tunnel entrance.

b. Creates a dangerous situation with employees of Defendant running across lanes of traffic entering the tunnel.

c. Creates confusion as Defendant's vehicle leaves the tunnel entrance, against oncoming traffic.

5. That he and other tunnel employees must attempt to reduce the congestion and confusion at the tunnel entrance, and that said congestion is often impossible to control, especially during rush hours.

6. That the volume of Defendant's business is very heavy, especially during weekends and rush hours; for example between 10:30 and 11:30 A.M. on Sunday, October 13, 1968, 23 bottles of liquor was [sic] delivered to waiting cars.

7. That Defendant's operations constitute a continuing trespass on Plaintiff's property, and interferes with the collection of tolls and with traffic.

8. That on Sunday morning, October 13, 1968, the men who deliver liquor to the cars for Defendant repeatedly redirected their customers' cars into the scale lane, thereby forcing other cars in that lane, which had been diricted there by our traffic guards, to take another lane.

9. The same afternoon between 1 and 2 P.M. the following incidents occurred. Two cars, (at different times) came into my lane to pay toll and collect their liquor from Defendant. Since the men from Defendant were late in delivering the liquor to these cars, the customers pulled into our parking lot, having already delayed my traffic lane by waiting at the toll booth for their liquor. When the men from Defendant finally arrived they trespassed on our property to deliver the liquor to these cars.

/s/ Arthur E. Walczak
Traffic Captain

Subscribed and sworn to before me this 14 day of October, 1968.

/s/ Charles J. O'Brien
Notary Public, Wayne County, Michigan.
My commission expires 8-24-72.

AFFIDAVIT OF RUSSELL BOUCHARD

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

State of Michigan,
County of Wayne—ss.

Russell Bouchard, being duly sworn, deposes and says:

1. That he is the Traffic Supervisor of the Detroit & Canada Tunnel Corporation.

2. That he is responsible for the traffic control entering the tunnel.

3. That he has read the affidavit of Arthur Walczak, and agrees with it in all respects.

4. On more than one occasion with three or four lanes of traffic a car comes down the left hand bus lane from Randolph Street under the impression that they are to pick up their liquor purchase in that lane. The car stops near the tunnel entrance with a bus behind it. It then becomes necessary for the toll collector to halt the traffic in the left hand lane, back the bus up, and direct the car into the right hand lane.

5. The messenger who drives Defendant's vehicle has to cut through traffic to reach the waiting room causing a delay in collecting tolls. He has to repeat the procedure to return to his base of operation.

6. When Defendant's employees have more than one purchase to deliver, it becomes necessary to hand the purchase to the people at the toll booths while the collector

is collecting tolls. During this time Defendant's vehicle is parked in a zone marked "No Parking—Tow Away Zone." I have repeatedy asked them to refrain from parking in this area, but to no avail.

7. Defendant's operation continues to disrupt traffic as the messengers are delivering liquor at the same time the collector is trying to collect. Also Defendant's employees must drive out of the tunnel area against oncoming traffic, creating a dangerous and hazardous situation.

8. Defendant's employees have on occasion run through the lanes of traffic trying to divert the cars awaiting delivery of purchases into the right hand scale lane. This causes confusion as other traffic sees both Defendant's employee and tunnel employee directing traffic, often in opposition of each other.

9. As soon as it gets dark, Defendant's employees have a hard time seeing which car is to receive the liquor purchase, causing additional confusion.

10. On several occasions on Sunday, October 13, 1968 liquor purchases were not delivered to customers until after they had paid their toll and entered the tunnel. The purchasers then stopped their cars beyond the toll booth at the tunnel entrance awaiting their liquor purchases while causing a complete block of oncoming traffic. Defendant's employees were required to pass beyond the toll booth in order to deliver liquor to these cars.

/s/ Russell Bouchard,
Traffic Supervisor

Subscribed and sworn to before me this 14th day of October, 1968.

/s/ Charles J. O'Brien
Notary Public, Wayne County, Michigan.
My commission expires 8-24-72.

ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND TEMPORARY RESTRAINING ORDER

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

At a session of said Court held in the City-County Building on the 14th day of October, 1968

Present: Honorable Joseph G. Rashid, Circuit Judge

On reading and filing the Complaint filed in this cause and the affidavits attached thereto and on motion of the attorneys for Plaintiff, it is hereby ordered:

1. That the Defendant be and appear before this Court on the 16th day of October, 1968 at 9:30 o'clock A.M. Eastern Standard Time, and show cause, if any they have, why a temporary injunction should not issue in accordance with Paragraph B of the Prayer of said Complaint.

2. That a true copy of this Order and a copy of the Summons and Complaint in this action be served on Defendant on or before the 14th day of October, 1968.

3. That in the meantime and until the further order of the Court, Defendant Export Liquor Sales, Inc. is temporarily restrained from trespassing in connection with

his liquor sales business on Plaintiff's own property or properties leased to Plaintiff; from interfering with the collection of tolls at Plaintiff's Tunnel; and from causing congestion and traffic hazards on Plaintiff's property and property leased to Plaintiff.

4. This order is issued for the reason that it appears from the Complaint and the attached affidavits that immediate and irreparable harm will come to Plaintiff if the continuing trespass is not enjoined, as confusion and congestion have resulted and will result in a condition extremely dangerous to life and property at the tunnel entrance.

5. Since this temporary restraining order only restrains a continuing trespass as set forth in M.S.A. §27A.-2919, which trespass is itself unlawful, no bond is considered necessary.

6. This order is issued October 14, 1968 at 2:10 o'clock, P.M.

/s/ Joheph G. Rashid
Circuit Judge.

CERTIORARI DENIED